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“The Connecticut Experience: What Can be Done to Spur Brownfield Redevelopment Along  
America’s New England Corridor?”  
Before the U.S. House of Representatives Committee on Government Reform  
Subcommittee on Federalism and The Census

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Mr. Chairman and members of the Subcommittee, I thank you for the opportunity to appear before you today on the topic of brownfield redevelopment in Connecticut and the New England region. My name is Elizabeth Barton. I am a partner with Day, Berry & Howard, Connecticut’s largest law firm. In addition to our five Connecticut offices, Day, Berry & Howard has offices in New York City and Boston. I chair the Environmental and Land Use Department at Day, Berry & Howard and have been practicing in the environmental and land use area for over 20 years. I am resident in Day, Berry & Howard’s Hartford office. My practice, like the practice of Day, Berry & Howard, is national in scope, with a primary focus being New England. I have been very fortunate in that my experiences in the brownfield arena span a full spectrum, from the very large, private redevelopment of an abandoned industrial, urban property by a widely respected national retail developer to the small, underutilized contaminated parcel being redeveloped by a local nonprofit community organization. While these projects can differ significantly in scope, a number of the challenges they face as brownfield redevelopments are the same.

I testify before you today as an individual who firmly believes brownfield redevelopment is a win-win for all stakeholders and essential to the economic vitality of our region. I applaud the efforts of this Subcommittee to understand and then address the impediments to brownfield development that still exist today. While there is ample evidence of government’s commitment at the federal, state and local levels to brownfield redevelopment, the successful brownfield project in Connecticut, as elsewhere, is still more of an effort and an exception than it should be. I share the commitment to making Connecticut and New England ever more conducive to the investigation, remediation and productive reuse of our brownfield properties, many a legacy of an industrial past that is an integral part of the fabric of our country as well as our region.

I am presently the Secretary of the Connecticut Chapter of the National Brownfield Association, a member of the National Brownfield Association’s Advisory Board and a co-chair of the government affairs task force of the Connecticut Business and Industry Association’s Environmental Policies Council. I have been a member of the Board of Directors of the New England Council and also the International Council of Shopping Centers for many years. My experience in the brownfield arena is as counsel to the universe of stakeholders, including owners, developers, lenders, and governmental entities.

As the Subcommittee accurately notes, even without the benefit of a comprehensive national inventory, it is safe to assume that Connecticut is among those states with a disproportionate share of these unproductive sites. The emphasis today in Connecticut is on job creation and retention, both of which rely on economic growth and sustainable development. Connecticut's economic health and the enhanced cleanup and redevelopment of the unproductive sites within its borders are inextricably linked.

In my testimony, I would like to touch upon several topics of continuing critical importance to brownfield redevelopment. Brownfield redevelopment first and foremost should be seen as what it is, that is, a type or subset of real estate development. It is real estate development with unique challenges that carry additional budget line items. We have spoken for years about the need to "level the playing field" to assure brownfield redevelopment. The reality is that effective competition with greenfield and out of state locations actually requires a demonstrable "edge" for the brownfield site. Topics of relevance to giving this edge include streamlining the development process, predictability and finality. Since brownfield projects are real estate projects and the real estate projects that get built are profitable projects, the common driver behind all of these topics is the need to make it economically viable to pursue the brownfield redevelopment to completion. In the real estate development realm, this viability can come in the form of direct economic incentives, such as grants, loans and tax credits, but also, since time delays and a lack of predictability translate into additional project cost, viability is enhanced with the constructive coordination of regulatory involvement, clearer limitation on and definition of liability for those involved, and finality when it comes to addressing historical site conditions.

The actions of agencies such as the United States Environmental Protection Agency, the Connecticut Department of Environmental Protection and Connecticut's economic agencies in making loan and grant funding available for brownfield redevelopment are commended and should continue; they facilitate brownfield redevelopment. Current efforts toward making these direct financial tools more flexible and transparent as to who and what costs are eligible and when are critical to maximizing their benefit. In Connecticut, where there has been a resurgence of an emphasis on, and the integration of, comprehensive and responsible land use planning, there is a need likewise for the reassessment and continuing evolution of public policy and regulation impacting, direct and indirectly, brownfield redevelopment. H.R. 4480 and several bills before the Connecticut General Assembly this session reflect a realization of this need for continual reassessment and evolution.

We now have, and should take advantage of, hindsight into how the multiple funding mechanisms have or have not worked in furthering brownfield redevelopment. Each of these mechanisms, at a minimum, is ripe for a cost/benefit analysis as a step toward an informed reassessment of the best use of available, but understandably limited, funding. As the brownfield redevelopment area continues to mature, we need to ask how can we assure we are getting the most from our public dollars.

Part of the challenge we face stems from the fact that one size does not fit all when attempting to identify and then address impediments to a brownfield cleanup and redevelopment. Where the value of a specific brownfield property, once remediated, is less than the cost of remediation, the incentives that will spur redevelopment likely differ from the incentives that will make or break

the redevelopment of a former manufacturing site in the midst of residential development or even other commercial or mixed use properties. The former might benefit most from either tax credit measures such as that provided for in H.R. 4480 or incentives that encourage and facilitate the assemblage of clean and not-so-clean properties (thereby spreading the cost of investigation and remediation and resulting in an acceptable cost per acre developed). The latter, however, may require greater employment of resources to better address concerns about the predictability and finality of the process and any residual liability for the owner or developer of the site. Each stakeholder in a brownfield redevelopment has a discrete level of risk tolerance. If this risk tolerance can be accommodated or, in the alternative, revised upward due to public policy and regulatory involvement, the project will likely move forward.

A successful brownfield project is not necessarily one dependent upon public funding. The reality is that even where such funding would be available, private parties may opt to not pursue it, if only because of the process involved in securing the funding. Connecticut's 20 years of experience with its Transfer Act gives insight into how the private sector works when it comes to transactions involving contaminated properties. While there have been significant amendments to this program over the years, a large measure of its success at getting parties in a transfer of a covered property or business to focus on relevant environmental conditions is attributable to the negotiation and allocation of obligation and risk among the private parties, that is, without the direct involvement of the regulators. The success of this program, which is usually applicable to any brownfield redevelopment, can only be enhanced to the extent we can give more clarity to the extent of liability to investigate and remediate and to how and when this liability will be satisfied. Statutory provisions such as the 2002 federal legislation and the third party liability legislation passed by the Connecticut General Assembly last session lessen the uncertainty as to the allocation of, or at least help in the effort to bracket, this liability. Should the purchaser and the developer of a brownfield site be viewed differently from the potentially responsible party? Without the actual or perceived inflexibility in other regulatory schemes, i.e., RCRA corrective action and closure, which currently do not expressly deal with brownfield redevelopment, where on-site sources of contamination and continuing offsite releases are being addressed by a brownfield redevelopment, should the purchaser or developer be required also to disprove to a certainty any linkage between potential off-site contamination and historical activities at the brownfield site? In a state like Connecticut, fortunate to have a wealth of land which borders significant and valued waters, should the purchaser or developer of such land be required to "chase" any potential historical contamination into waters bordering a site, particularly where there are likely multiple historical uses and potential sources for such contamination?

What keeps an owner of a brownfield from either remediating and redeveloping it on his or her own or, in the alternative, transferring it to someone else toward this same end? Assuming this owner is not in the business of remediating and redeveloping contaminated properties, he or she is typically looking to transfer this liability to the greatest extent possible. However, the owner realizes that with such a transfer he or she could remain liable to third parties. Hence, during negotiation of such a transfer, much attention is given to mechanisms to assure the complete and timely satisfaction of the liability or risk being transferred.

Connecticut has (and should tout) its brownfield successes, large and small, for profit and not for profit. However, the experience in other states might suggest ways to maximize these successes

in number and type. There is an actual or perceived opportunity to coordinate public agencies (and multiple offices within these agencies) involved in a brownfield investigation and redevelopment. A bill introduced this session at the Connecticut General Assembly – Raised Bill No. 5685, entitled An Act Concerning Brownfields – would create an Office of Brownfield Remediation and Development within the Connecticut Department of Economic and Community Development. Connecticut’s Commissioner of Environmental Protection Gina McCarthy has recently appointed her Department’s first Brownfields Coordinator. The Connecticut Department of Environmental Protection, Connecticut Department of Economic and Community Development and Connecticut Development Authority have gotten together in an effort to work collaboratively on economic development, including brownfield development. But can even more be done to coordinate process under otherwise independent programs both within and among these and other agencies? A framework that, rather than adding layers, streamlines and promotes the consistency of the outcomes of these regulatory processes as they apply to brownfield redevelopment is needed. A single point of agency contact, with an ability to facilitate the review and permitting of brownfield related activities, would be a welcomed priority.

I previously referenced Connecticut’s Transfer Act. Especially as these properties are now changing hands, some for the third or fourth time, the absence of a clear and reasonable end point in the Transfer Act process can frustrate this activity. Without knowledge of an endpoint (including the conclusion of any agency audit period), parties struggle to identify remedial work that any agency or subsequent purchaser or major tenant could conceivably see as yet to be done and then quantify its cost, a step in the negotiation which is significantly handicapped by the absence of greater predictability. Often, for example, the parties cannot identify the amount and term of security to support the allocation of responsibility between the parties. Because a brownfield redevelopment may be undertaken, not by the potentially responsible parties, but rather by those seeking to implement a well defined investment strategy, there is generally only a greater need for clarity and finality. On the flip side, even the otherwise potentially responsible seller requires this clarity and finality since his or her control of the property could be transferred with the risk.

Connecticut’s increased focus on how we grow and the most appropriate use of an aging infrastructure dictates only a greater need for special recognition and priority for the cleanup and redevelopment of its brownfield sites. We must identify and make the most of creative and different ways to leverage public monies and directly address identified impediments to brownfield redevelopment that still remain. Adopting the slogan heard at last week’s rally at the State Capitol in support of legislation for the funding of statewide transportation improvements, we must all pull together to “Keep Connecticut Moving.”

Thank you again for the invitation to be here today and for your continued support of brownfield redevelopment. Mr. Chairman, I would be happy to respond to any questions any member of the Subcommittee may have.